Supreme Court, U.S.
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No. 02-638

In The
Supreme Court of the United States

AGENCIA LA ESPERANZA CORPORATION, INC.,

Petitioner,

v.

ORANGE COUNTY BOARD OF SUPERVISORS and ORANGE COUNTY PUBLIC FACILITIES AND RESOURCES DEPARTMENT,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals Of The State Of California

BRIEF AMICI CURIAE OF BUILDING INDUSTRY ASSOCIATION OF WASHINGTON AND NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICI

Pursuant to Supreme Court Rule 37, Building Industry Association of Washington (BIAW) and the New England Legal Foundation (NELF) respectfully submit this brief amicus curiae in support of petitioner, Agencia La Esperanza Corporation. Written consent to the filing of this amicus brief has been granted by counsel for all parties.[1] Copies of the consent letters have been lodged with the Clerk of the Court.

BIAW is Washington state's largest trade association, with over 9,600 members representing over 350,000 Washington citizens who work in various trades associated with the development and construction of residential housing. BIAW members routinely are required to pay impact fees, such as the traffic mitigation fees at issue in this case, as a condition of receiving subdivision approval. BIAW has a substantial interest and stake in the determination of whether such fees must be "roughly proportional" to the impact caused by the proposed development.

The New England Legal Foundation (NELF) is a nonprofit, public interest law firm, incorporated in Massachusetts in 1977. It is headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth for New England, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a

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[1] Pursuant to Supreme Court Rule 37(6), counsel for amici authored the brief in whole. Amici solely funded the preparation and filing of this brief.

cross-section of large and small corporations from all parts of the Commonwealth, New England, and the United States. NELF's members are affected by the business climate in New England and nationwide. Furthermore, some of NELF's members are directly interested in the issue of regulation of real estate development because they are involved in building, owning, managing, insuring, and financing real property. A healthy real estate climate is a mark of a vital and vibrant economy and depends on secure rights for property owners. For those reasons, NELF's members are concerned about the issues presented in this case.

The opinion below holds that the heightened scrutiny set forth by this Court in *Dolan v. City of Tigard*, 512 U.S. 374 (1994) is not applicable to legislatively adopted exactions. As a result, the lower court's ruling stands for the proposition that when conditions are attached to the approval of development permits via legislative authorization, the conditions do not have to be "roughly proportional" to the impact created by the proposed development. Amici believe that the ruling below is incorrect and will severely impact private property rights and affordable housing.

STATEMENT OF THE CASE

This case involves the appropriate judicial scrutiny that should be applied to exactions. An exaction is a demand that a property owner give up something of value – whether it be land, an interest in land, or money – as a condition to obtaining necessary permits or other governmental approvals to build on one's property.

The type of exaction involved in this case is an impact fee. Impact fees are levied by local governments against a proposed new development in order to generate revenue for infrastructure allegedly necessitated by the new development. Impact fees have been an increasingly popular way for governments to raise revenue in lieu of taxes.

In this case, Agencia La Esperanza Corporation (Esperanza) constructed a 110,414 square foot self-storage facility in Orange County, California. As a condition for approval of the project and issuance of building permits, Esperanza was required to pay a total of $194,880 as traffic mitigation fees. The impact fees were computed by looking at three factors: the anticipated use (nonresidential), the gross square footage or number of units, and the area of benefit as defined in the fee program.

The County concedes that it never conducted a traffic analysis to determine the actual impact of the project. Instead, the County lumps the proposed self-storage facility in with other types of commercial uses and applies a uniform fee calculation. The problem is that self-storage facilities generate significantly less traffic than other types of commercial uses. For example, the undisputed evidence established that Esperanza would have to pay the same fee per square foot as a similarly sized medical clinic located in the same area even though the medical clinic generates approximately twelve times as much traffic. Petition for Writ of Certiorari at 3-4.[2] In short, the

[2] This calculation was based upon the Moulton Parkway fee program. Under that program, Esperanza would have to pay approximately $220 per trip generated. Under that same program, however, a

(Continued on following page)

amount of the fee is grossly disproportionate to the impact of the project.

Under this Court's precedent in *Dolan v. City of Tigard*, Esperanza contends that the traffic fee is not related in "extent to the impact of the proposed development." 512 U.S. at 391. Indeed, the California Court of Appeals practically conceded that the imprecision of the calculation does not meet the roughly proportional test of *Dolan*. Pet. for Cert., Appendix A-4 and A-5. Nevertheless, because the traffic fee was *uniformly imprecise*, the California court concluded that constitutional protections established by this Court were not triggered. As stated by the court below:

> Here, the calculation of development fees, imprecise as it may be, is applied uniformly, generally, and ministerially. As a result, heightened scrutiny is not triggered.

Pet. for Cert., Appendix A-4.

The court below held that the heightened standard of judicial scrutiny set forth in *Dolan*, requiring that exactions be roughly proportional to the impact caused by the proposed development, was not triggered because the fees were uniformly applied to project applicants through legislation. The issue presented for this Court's resolution

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clinic would only pay $17.49 per trip and a medical-dental office would pay only $15.22 per trip. Under the second fee program, the Coastal Area Fee Program, Esperanza would have to pay $486 per trip, while a medical clinic would pay approximately $38.64 per trip and a medical-dental office would pay only $33.63 per trip.

is whether the applicability of the constitutional protections established in *Dolan* can so easily be circumvented.

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10.1(b) lists among the considerations governing review on certiorari the circumstance when a state court of last resort has decided a federal question in a way in conflict with another state court of last resort, or of a Federal Court of Appeals. Rule 10(c) includes as a ground for review when a state court of last resort has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court. Both of these grounds for review are present in this case.

I

THERE IS A SPLIT AMONG STATE AND FEDERAL COURTS THAT SHOULD BE SETTLED BY THIS COURT

Lower courts have been interpreting *Dolan* in an inconsistent manner thus creating a nationwide split of authority on whether *Dolan's* rough proportionality test applies to legislatively enacted exactions. Currently, both scholars and the courts have commented on the significant "split of authority" clouding this issue. *See e.g.*, Faus, Richard Duane, *Exactions, Impact Fees, and Dedications: Local Government Responses to Nollan/Dolan Takings Law Issues*, 29 STETSON L. REV. 675, 693-701 (2000) (recognizing a "nationwide split of authority" on whether the *Dolan* test applies to legislatively enacted, uniformly

applied impact fees); Reznik, Inna, *The Distinction Between Legislative and Adjudicative Decisions in Dolan v. City of Tigard*, 76 NYU. L. REV. 242, 256-57 (2000) ("There is considerable disagreement over whether legislative decisions are subject to *Dolan's* heightened scrutiny review."); *Garneau v. City of Seattle*, 147 F.3d 802, 811 (9th Cir. 1998) (there is "considerable doubt" about the applicability of the *Dolan's* rough proportionality test to "legislative, as opposed to administrative exactions"); *Home Builders Association of Central Arizona v. City of Scottsdale*, 930 P.2d 993, 1000 (Ariz.), *cert. denied*, 521 U.S. 1120 (1997) (the question "has not been settled."); *Rogers Machinery, Inc. v. Washington County*, 45 P.3d 966, 976 (Or. 2002) (A "split of authority exists in lower courts as to whether *Dolan* is limited to development conditions imposed through adjudicatory decisions or whether it extends to those imposed as a result of generally applicable legislation.").

Two Justices of this Court have acknowledged the "conflict" over whether *Dolan's* test should be applied when exactions are imposed through legislation. *Parking Association of Georgia, Inc. v. City of Atlanta*, 515 U.S. 1116, 1118 (1995) (Thomas, J., and O'Connor, J., dissenting from denial of certiorari) ("the lower courts should not have to struggle" with this issue.).

A review of courts dealing with this issue reveals that characterizing the issue as "unsettled" is an understatement. Two federal courts and five state jurisdictions have applied *Dolan's* heightened scrutiny to legislatively imposed exactions. *City of Portsmouth v. Schlesinger*, 57 F.3d 12, 16 (1st Cir. 1995) (*Dolan* analysis applied to impact fee imposed by ordinance); *National Association of Home Builders of the United States v. Chesterfield County*, 907

F. Supp. 166, 167 (E.D. Va. 1995), *aff'd*, 92 F.3d 1180 (4th Cir. 1996) (*Dolan* applied to a county policy to guide the county's acceptance of proffers); *Northern Illinois Home Builders Association, Inc. v. County of Du Page*, 649 N.E.2d 384, 388-389 (Ill. 1995) (*Dolan* applied to transportation impact fee ordinance); *Curtis v. Town of South Thomaston*, 708 A.2d 657, 660 (Maine 1998) (*Dolan* applied to fire protection ordinance requiring developers to construct fire pond); *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479, 482 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995) (*Dolan* applied to statute requiring apartment owners to renew certain leases with non-private hospital employees); *Home Builders Association of Dayton and the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 353 (Ohio 2000) (*Dolan's* "rough proportionality" test applicable to ordinance imposing impact fees); *Trimen Development Company v. King County*, 877 P.2d 187, 191 (Wash. 1994) (*Dolan* applicable to ordinance imposing park development fees).[3]

On the other hand, eight state courts have held *Dolan's* heightened review is inapplicable to legislatively imposed exactions. *See e.g.*, *Home Builders Association of Central Arizona v. City of Scottsdale,* 930 P.2d at 1000 (*Dolan's* rough proportionality test does not apply to water service fee enacted by ordinance and uniformly applied to all properties); *Ehrlich v. City of Culver City*, 911 P.2d 429, 444

[3] A recent Washington Supreme Court case resolved this issue under statutory grounds instead of determining the applicability of *Dolan* to an ordinance requiring all subdivisions to leave 30 percent of the land as open space or pay a fee in lieu. *See Isla Verde International Holdings v. City of Camas*, 49 P.3d 867 (Wash. 2002). As a result, the Washington Supreme Court did not reach the constitutional question.

(Cal.), *cert. denied*, 519 U.S. 929 (1996) (*Dolan* inapplicable to fees imposed legislatively); *Krupp v. Breckenridge Sanitation District*, 19 P.3d 687 (Colo. 2001) (*Dolan* inapplicable to sanitation district fee imposed legislatively); *Parking Association of Georgia v. City of Atlanta*, 450 S.E.2d 200, 203 (1994), *cert. denied*, 515 U.S. 1116 (1995) (ordinance imposing parking lot standards upon parking lot owners held not to violate *Dolan* because it was a legislative determination); *Southeast Cass Water Resource District v. Burlington Northern R. Co.*, 527 N.W.2d 884, 885 (N.D. 1995) (*Dolan* not applicable to requirement that railroad pay costs for alterations of bridge and culverts because imposed under legislative enactment); *Waters Landing Limited Partnership v. Montgomery County*, 650 A.2d 712, 724 (Md. 1994) (*Dolan* inapplicable to development impact fees); *Arcadia Development Corp. v. City of Bloomington*, 552 N.W.2d 281, 286 (Minn. 1996) (*Dolan* inapplicable to ordinance requiring mobile home park owners to close their parks to pay relocation costs to park residents); *Rogers Machinery, Inc. v. Washington County*, 45 P.3d 966, 967, 982 (Or. Ct. App.), *petition for review to the Supreme Court of Oregon denied*, 52 P.3d 1057 (Or. 2002) (*Dolan* inapplicable to traffic impact fee assessed by ordinance).

A survey of lower courts applying *Dolan* confirms that there is much confusion over whether *Dolan's* rough proportionality test should be applied to legislative versus adjudicative land use decisions. The effect is that in some jurisdictions, lower courts will apply the *Dolan* heightened scrutiny to legislatively imposed exactions, while in others, a less stringent review will be conducted on such exactions. This inconsistent application of *Dolan* depending on which jurisdiction you live in results in unequal enforcement of the federal constitution. Property owners

seeking government permits, whether they reside in Washington, New England, or California, are entitled to have their federal constitutional rights consistently and fully protected. The time is ripe for this Court to provide the lower courts with necessary guidance on this issue.

II

WHETHER THE *DOLAN* "ROUGH PROPORTIONALITY" STANDARD APPLIES TO LEGISLATIVELY IMPOSED EXACTIONS PRESENTS AN IMPORTANT QUESTION OF REGULATORY TAKINGS LAW

The Takings Clause of the Fifth Amendment of the United States Constitution, made applicable to the States through the Fourteenth Amendment, *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226 (1897), provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The principal purpose of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40 (1960).

This Court has established a special subset to regulatory takings law when the government conditions the granting of permit approval on an exaction:

> Under the well-settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right – here the right to receive just compensation when property is taken for a public use – in exchange for a discretionary benefit conferred by the

> government where the benefit sought has little or no relationship to the property.

Dolan, 512 U.S. at 385.

As succinctly put by Justice Harlan over 100 years ago:

> In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation.

Village of Norwood v. Baker, 172 U.S. 269, 279 (1898).

This Court has formulated a two-part test for use in determining whether an exaction constitutes an impermissible taking. First, the court determines whether an essential nexus exists between a legitimate state interest and the condition exacted by the government. *Nollan*, 483 U.S. at 836. If an essential nexus exists, the court must decide the required degree of connection between the exaction and the projected impact of the proposed development. *Dolan*, 512 U.S. at 386-88. No precise mathematical calculation is required, but the government must make some sort of individualized determination that the exaction is roughly proportional in both nature and extent to the proposed impact of the proposed development. *Id.* at 391.

Under *Dolan*, the burden of proof to justify the exaction is on the government, not the property owner. *Id.* at 374, n. 8. The test set forth in *Dolan* is important because its "rough proportionality" test elevates the level of scrutiny courts must give to exactions and prevents

governments from leveraging permit approval on illegal exactions.

The importance of this case is evidenced on its broad impact and the nature of the issue raised. The outcome of this case will have an impact on anyone who is subject to a legislatively authorized exaction such as an impact fee. This could potentially affect the majority of developers and purchasers of new homes in this nation. Impact fees can range from several hundred dollars to thousands of dollars per home or building. IMPACT FEE HANDBOOK (National Association of Home Builders) 1997 at 2. A study shows that impact fees and regulatory costs account for a nationwide average of 4.5 percent of the cost of a new home. George Avalos, *"Tangle of Red Tape Inflates Costs for Homebuyers in the East Bay,"* CONTRA COSTA TIMES, Sept. 29, 2002. An outrageous example in the San Francisco area of California reflects the effect burdensome exactions can have on housing affordability. In Livermore, California building exactions have topped $100,000 per house. HBA News, *"City of Livermore Tops $100,000 in Home Building Fees"*, July/August 2002 at 14. Because such fees become part of the purchase price, the detrimental effect it has on housing affordability is staggering.

As governments continue to face economic challenges of generating additional revenue to fund needed infrastructure without raising taxes, the trend will be for more local jurisdictions to impose such exactions in increasing amounts. Amici are concerned that without the *Dolan* test, governmental bodies will be able to shift the responsibility for funding general improvements onto a discrete segment of the public. The *Dolan* test ensures that the cost of such exactions does not exceed the development's fair share of the cost of improvements.

Another measure of the importance of this case is the amount of litigation that has already taken place on this issue. The current uncertainty over what standard of review governs such exactions benefits no one. Both developers and governmental bodies deserve to know the appropriate standard of review for determining when an exaction is an unconstitutional taking.

The issue presented in this case involves a substantial federal question involving regulatory takings. The resolution of this issue has far reaching effects and needs to be addressed by this Court.

III

DOLAN'S HEIGHTENED SCRUTINY SHOULD BE APPLIED TO LEGISLATIVELY IMPOSED EXACTIONS

The question presented is whether the "rough proportionality" standard announced in *Dolan* applies to the exaction in this case. Amici contend that it does apply because there is no principled basis for distinguishing between legislative versus adjudicative land use decisions.

Courts limiting the application of the "rough proportionality" standard to purely adjudicative exactions, as opposed to legislatively authorized exactions, reason that the risk of municipal "extortion" is much greater in the adjudicative context. *See San Remo Hotel L.P. v. City and County of San Francisco*, 41 P.3d 87, 102-104 (Cal. 2002); *Home Builders Association of Central Arizona*, 930 P.2d at 1000. More specifically, these courts rationalize that the legislative and political processes have more protections in place for landowners from such abuses by government. This reasoning is flawed.

There is no basis for the rationale that legislative and political processes provide more protection to property developers. First, due process does not apply to legislative enactments so landowners or future potential developers are entitled to no notice of proposed impact fee legislation. Second, non-resident landowners and developers have no voting interest in local elections so their outsider interests are clearly in the minority. Third, the interests of even resident landowners or developers are easily discounted as based solely on personal financial interest and not the interest of the community. The correct application of the *Dolan* test protects those minority interests.

Exactions can be imposed unfairly and disproportionately through legislation or on an individual basis. Applying *Dolan* to one form of government action, but not the other, does not make sense. The threat of leveraging discussed in *Dolan* is just as likely to occur in legislative decisionmaking processes as in adjudicative settings. Because both types of exactions involve conditioning governmental land use approval and present the same opportunities for governmental "leveraging," the constitutional protection should be consistently applied.

Two Justices of this Court have cast serious doubt on the theory that legislatively adopted rules should not be subject to rough proportionality review. *Parking Association of Georgia, Inc. v. City of Atlanta*, 515 U.S. 1116 (1995) (dissent from denial of petition for writ of certiorari, Thomas, J., joined by O'Connor, J). Justice Thomas points out that:

> It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission

> can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis. If Atlanta had seized several hundred homes in order to build a freeway, there would be no doubt that Atlanta had taken property. The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.

Id. at 1117-18. A subsequent Illinois state court decision agreed with Justice Thomas' viewpoint. *Amoco Oil Company v. Village of Schaumburg*, 661 N.E.2d 380 (Ill. 1996). That court said, "Certainly, a municipality should not be able to insulate itself from a taking challenge merely by utilizing a different bureaucratic vehicle when expropriating its citizen's property." *Id.* at 390.

The *Dolan* test balances the competing interests of both developers and government and should be applied to all types of exactions. The Supreme Court of Ohio explained such competing interests in holding that *Dolan* was applicable to a legislatively imposed impact fee ordinance for funding roadway improvements:

> We believe this test [Dolan] will adequately balance the interests of local governments with those of property owners. The first prong of the test decides whether the ordinance is an appropriate method to address the city's stated interests, and the second prong assures that the city and developers are paying their proportionate share of the cost of new construction.

Home Builders Association of Dayton, 729 N.E.2d at 356.

The case now at bar presents a good example of what happens when *Dolan's* rough proportionality test is held inapplicable to an exaction imposed through legislation. Esperanza is saddled with paying significantly more than its proportionate share of the cost its development will have on traffic. The lower court's decision thus creates a loophole for governments to avoid having to comply with *Nollan/Dolan*. Under the decision below, government entities can use their "leveraging" authority through legislation instead of the adjudicative process to insulate themselves from liability under the Constitution. The Fifth Amendment does not allow such an exemption.

CONCLUSION

Whether *Dolan's* "rough proportionality" standard applies to legislatively imposed exactions is an issue needing definitive resolution by this Court as evidenced by the split of authority across the nation on this issue. Until this Court resolves this substantial federal question concerning regulatory takings law, the *Dolan* standard will continue to be inconsistently applied across the nation by state and federal courts. Amici respectfully urge this Court to grant the petition for writ of certiorari and reverse the judgment of the California Court of Appeals.

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Respectfully submitted,

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